

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JANE ELLEN KISSNER,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

NO. C11-5878-RAJ-JPD

REPORT AND
RECOMMENDATION

Plaintiff appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a fifty-three year old woman with a high school education. Administrative Record (“AR”) at 49. Her past work experience includes employment as a bartender and as a business manager at an automotive dealership. AR at 50.

On April 20, 2007, she filed applications for DIB and SSI, alleging an onset date of August 15, 2002. AR at 22. At the administrative hearing, however, the plaintiff amended her

1 onset date to February 22, 2006, which effectively withdrew her application for DIB because
2 her date last insured expired prior to her amended onset date. AR at 42-43. With respect to
3 her remaining claim for SSI, the plaintiff asserts that she is disabled due to seizures, short term
4 memory, weakness, and a history of cancer and a broken jaw. AR at 183.

5 The Commissioner denied the plaintiff's claim initially and on reconsideration. AR at
6 119, 122, 129, 132. Plaintiff requested a hearing which took place on January 13, 2010. AR at
7 22. On January 29, 2010, the ALJ issued a decision finding the plaintiff not disabled and
8 denied benefits based on his finding that the plaintiff could perform a specific job existing in
9 significant numbers in the national economy. AR at 31-32. After reviewing additional
10 evidence, the Appeals Council denied plaintiff's request for review, making the ALJ's ruling
11 the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). AR at
12 6. Plaintiff timely filed the present action challenging the Commissioner's decision. Dkt. 1.

13 II. JURISDICTION

14 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C.
15 §§ 405(g) and 1383(c)(3).

16 III. STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
18 social security benefits when the ALJ's findings are based on legal error or not supported by
19 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
20 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
21 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
22 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
23 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,

53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Ms. Kissner bears the burden of proving that she is disabled within the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C.

§§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the

1 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
2 99 (9th Cir. 1999).

3 The Commissioner has established a five step sequential evaluation process for
4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.
5 §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four.
6 At step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
7 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
8 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
9 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
10 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
11 or more medically severe impairments, or combination of impairments, that limit her physical
12 or mental ability to do basic work activities. If the claimant does not have such impairments,
13 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
14 impairment, the Commissioner moves to step three to determine whether the impairment meets
15 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
16 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
17 twelve-month duration requirement is disabled. *Id.*

18 When the claimant’s impairment neither meets nor equals one of the impairments listed
19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
22 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If

23 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical
24 and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

1 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
2 true, then the burden shifts to the Commissioner at step five to show that the claimant can
3 perform other work that exists in significant numbers in the national economy, taking into
4 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R.
5 §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
6 claimant is unable to perform other work, then the claimant is found disabled and benefits may
7 be awarded.

8 V. DECISION BELOW

9 On January 29, 2010, the ALJ issued a decision finding the following:

- 10 1. The claimant meets the insured status requirements of the Social
11 Security Act through September 30, 2002.
- 12 2. The claimant has not engaged in substantial gainful activity since
13 February 22, 2006, the alleged onset date.
- 14 3. The claimant has the following severe impairments: epilepsy, carpal
15 tunnel syndrome, history of broken jaw, cocaine dependence,
16 depression, and personality disorder.
- 17 4. The claimant does not have an impairment or combination of
18 impairments that meets or medically equals one of the listed
19 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 20 5. The claimant has the residual functional capacity to perform light
21 work as defined in 20 CFR §§ 404.1567(b) and 416.967(b) except that
22 she cannot climb ladders, ropes, or scaffolds, and she must avoid
23 exposure to hazards such as open heights, open machinery, etc.
24 Additionally, the claimant has no ability for continuous, repetitive
motion with the upper extremities, but she is allowed frequent
fingering and handling. The claimant also retains the capacity to
understand, remember, and carry out short simple instructions while
performing routine, predictable tasks with only occasional contact
with the general public and co-workers.
6. The claimant is unable to perform any past relevant work.
7. The claimant was defined as a younger individual (age 18-49) on the
alleged disability onset date, but has changed age category to closely
approaching advanced age.

1 Commissioner's decision is supported by substantial evidence. Specifically, following the
2 ALJ's adverse ruling on January 29, 2010, the plaintiff submitted additional medical evidence
3 to the Appeals Council. AR at 992-98, 1017-31. The Appeals Council incorporated the newly
4 submitted evidence into the record, and denied the plaintiff's request for review on August 26,
5 2011. AR at 6-11.

6 In *Mayes v. Massanari*, the Ninth Circuit applied the materiality and good cause
7 standard set forth in sentence six of 42 U.S.C. § 405(g) to determine whether to remand that
8 case in light of additional evidence submitted to the Appeals Council. 276 F.3d 453, 461-62
9 (9th Cir. 2001). Sentence six of 42 U.S.C. § 405(g) provides in part, "[t]he Court . . . may at
10 any time order additional evidence to be taken before the Commissioner of Social Security, but
11 only upon a showing that there is new evidence which is material and that there is good cause
12 for failure to incorporate such evidence into the record in a prior proceeding[.]" 42 U.S.C. §
13 405(g).

14 The Commissioner argues that *Mayes* supports his view that the "materiality" and
15 "good cause" requirements of sentence six should apply to this Court's review of plaintiff's
16 "new evidence." Dkt. 20 at 2. Specifically, the Commissioner argues that to justify remand,
17 plaintiff must show that the additional evidence submitted to the Appeals Council was both
18 "new" and "material" to the disability determination, and that she had good cause for having
19 failed to seek additional medical opinions, or to produce that evidence, earlier. Dkt. 17 at 6.

20 Recently, the Ninth Circuit held that when the Appeals Council accepts additional
21 medical reports, which were unavailable to the ALJ at the time of the administrative hearing,
22 the evidence is incorporated into the administrative record for review by the district courts.
23 See *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1159 (9th Cir. 2012). In *Brewes*,
24 the Ninth Circuit considered additional evidence submitted to the Appeals Council after the

1 ALJ's decision pursuant to sentence four of 42 U.S.C. § 405(g). *See id.* at 1161-63. Sentence
2 four of 42 U.S.C. § 405(g) states, "[t]he Court shall have power to enter, upon the pleadings
3 and transcript of the record, a judgment affirming, modifying, or reversing the decision of the
4 Commissioner of Social Security, with or without remanding the case for a rehearing." 42
5 U.S.C. § 405(g). The *Brewes* court held that evidence submitted to the Appeals Council is not
6 considered "new evidence" at all, but rather is part of the administrative record properly before
7 the district court. *See id.* at 1164. Thus, because evidence submitted to the Appeals Council
8 after the ALJ's decision is part of the administrative record, sentence six requirements do not
9 apply. Specifically, the Ninth Circuit does not require that a claimant show "good cause" or
10 "materiality" before additional evidence submitted to the Appeals Council becomes part of the
11 record considered by the district court. *Id.* at 1162

12 Plaintiff asserts that the record, which now includes medical reports submitted to the
13 Appeals Council following the ALJ's decision, establishes that the Commissioner erred both in
14 finding that she failed to meet the criteria for a listed impairment, and in assessing her RFC.
15 Dkt. 13 at 7. The Commissioner, however, maintains that substantial evidence supports the
16 ALJ's decision. The Commissioner notes that the plaintiff's attorney told the ALJ at the
17 administrative hearing that he had all the evidence before him, and that the plaintiff's
18 subsequent medical reports were completed months later. Dkt. 17 at 4-5. Moreover, the
19 Commissioner asserts that the plaintiff's attempt to bolster the record with favorable medical
20 evidence after receiving notice of the ALJ's decision must fail, because the plaintiff has not
21 demonstrated good cause for the delay or that the additional evidence is material to the
22 disability determination. *Id.* at 5-6.

23 In light of *Brewes*, this Court will consider the additional medical reports the plaintiff
24 submitted to the Appeals Council, and which the Appeals Council incorporated into the record,

1 in determining whether substantial evidence supports the ALJ's decision. As discussed above,
 2 the Ninth Circuit held in *Brewes* that the threshold questions of good cause and materiality do
 3 not apply in these circumstances. Although this result raises significant policy issues regarding
 4 finality and possible gamesmanship regarding adverse ALJ decisions, this outcome is dictated
 5 by *Brewes*. Accordingly, the Court will consider the new medical evidence, consisting of
 6 records from the State of Washington Department of Social and Health Services ("DSHS"),
 7 dated from May 12, 2000 to October 5, 2010.²

8 B. The Commissioner Did Not Err in Determining that the Plaintiff Failed to Meet
 9 or Equal Listing 12.04, Affective Disorders

10 1. *The Legal Standard*

11 Step three of the sequential evaluation process requires the ALJ to determine whether
 12 plaintiff's impairments meet or equal any of the listed impairments set forth in Appendix 1 to
 13 20 C.F.R. Part 404, Subpart P. 20 C.F.R. §§ 404.1520(d), 416.920(d). The listings describe
 14 specific impairments in each of the body's major systems that are considered "severe enough
 15 to prevent a person from doing most gainful activity." 20 C.F.R. §§ 404.1525, 416.925(a).
 16 Severe impairments must be "permanent or expected to result in death," or must last or be
 17 expected to last for a continuous period of at least twelve months. 20 C.F.R. §§ 404.1525(a),
 18 416.925(a). The ALJ's analysis at step three must rely only on medical evidence and not on
 19 age, education or work experience. 20 C.F.R. §§ 404.1520(d), 416.920(d). To be found
 20 disabled at step three, the plaintiff must prove that she meets or equals each of the
 21 characteristics of a listed impairment. 20 C.F.R. §§ 404.1525(a), 416.925(a); *see also Burch v.*
 22 *Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). A claimant who meets or equals a listing is
 23 presumed disabled at step three without further inquiry. 20 C.F.R. § 416.920(a)(4)(iii).

24 ² The Appeals Council incorporated Exhibit 20F (AR at 992-98) and Exhibit 22F (AR at 1017-31) into
 plaintiff's administrative record. AR at 10.

2. *Listing 12.04, Affective Disorders*

The Social Security Administration, in evaluating the severity of a claimant's mental impairment, will consider any documentation of a medically determinable impairment, the degree of limitation imposed by the impairment, and the expected duration of the limitations on a claimant's ability to work. *See* 20 CFR Pt. 4, Subpt. P, App. 1. The mental impairment listings are divided into diagnostic categories. *Id.* Each listing is comprised of "paragraph A" criteria (medical findings) and "paragraph B" criteria (impairment-related functional limitations). *Id.* The listing for affective disorders has a third component, "paragraph C," which contains additional functional related criteria, and is only used if "paragraph B" is not satisfied. *Id.*

Listing 12.04 characterizes affective disorders as involving disturbances of mood, accompanied by manic or depressive syndrome. *Id.* To satisfy "paragraph A," a claimant must show medical documentation of depressive, manic, or bipolar syndrome. *Id.* To satisfy "paragraph B," a claimant must show at least two functional limitations sufficiently severe so as to be considered "marked" (activities of daily living, social functioning, maintaining concentration, persistence, or pace, and repeated episodes of decompensation). *Id.* To satisfy "paragraph C," a claimant must show a medically documented history of chronic affective disorder dating back at least two years. *Id.* The listing is satisfied if the requirements of "paragraph A" and "paragraph B" are met, or if the requirements of "paragraph C" alone are met. *Id.*; *see also Holohan v. Massanari*, 246 F.3d 1195, 1203-04 (9th Cir. 2001); *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 598 n.2 (9th Cir. 1999).

1 3. *Substantial Evidence Supports the ALJ's Conclusion that Plaintiff's*
2 *Impairments Do Not Meet or Equal Listing 12.04*

3 Plaintiff argues that the ALJ erred at step three by finding that her impairments did not
4 meet or equal Listing 12.04. Dkt. 13 at 5. Specifically, plaintiff contends that the record, as a
5 whole, establishes that she has been diagnosed with depression in each of her mental health
6 evaluations, and that the preponderance of medical evidence indicates that the plaintiff has
7 marked limitations in activities of daily living and social functioning, and marked restrictions
8 in maintaining concentration, persistence, or pace. *Id.* at 7.

9 The Commissioner contends that the ALJ properly concluded that the plaintiff's
10 impairments did not meet or equal the requirements of Listing 12.04, and that the plaintiff fails
11 to recognize that the ALJ discounted her subjective complaints and properly considered the
12 medical evidence available at the time of the hearing. Dkt. 17 at 3-4. The Commissioner
13 further argues that the plaintiff offers no more than a generalized assertion of functional
14 problems—a vague theory of harm. *Id.* at 3.

15 The ALJ did not err in finding that plaintiff's mental impairments failed to meet or
16 equal the criteria of Listing 12.04. The only medical evidence available to the ALJ at the time
17 of the hearing was a mental health evaluation from Dr. Loren McCollom. Consistent with Dr.
18 McCollom's report, the ALJ concluded that the plaintiff was only mildly limited in her
19 activities of daily living and social functioning, and that the plaintiff suffered from moderate
20 restrictions regarding concentration, persistence, or pace. Finally, Dr. McCollom failed to note
21 any periods of decompensation. AR at 544-58. Accordingly, the Court concludes that the ALJ
22 did not err in failing to find that plaintiff's mental impairments failed to satisfy the criteria of
23 Listing 12.04.

1 Even in light of the additional evidence from DSHS, the Court finds that substantial
2 evidence supports the ALJ's conclusion that plaintiff's mental impairments do not meet or
3 equal Listing 12.04. The Court disagrees with the plaintiff's characterization of the mental
4 health evaluations conducted by Dr. Jabbusch, Dr. Copeland, and Greater Lakes Mental
5 Healthcare ("Greater Lakes"). Although Dr. Jabbusch found that the plaintiff suffered from
6 isolation and could benefit from an anti-depressant regimen, he did not consider plaintiff's
7 depression severe enough to satisfy "paragraph A" criteria for depressive syndrome. AR at
8 664. Moreover, Dr. Jabbusch did not find that the plaintiff exhibited at least two of the criteria
9 listed under "paragraph B." AR at 664. Specifically, the doctor did not report that the
10 plaintiff suffered from a marked restriction of activities of daily living; marked difficulties in
11 maintaining concentration, persistence, or pace; or repeated episodes of decompensation.
12 Although the doctor indicates that the plaintiff is socially isolated, he refrains from labeling her
13 predicament as "marked." AR at 664. Even so, difficulty in maintaining social functioning is
14 only one of the two requisite results needed to satisfy "paragraph B."

15 Although Dr. Copeland's report could support an argument that plaintiff's mental
16 health condition met or equaled the affective disorder listing, the report is inconsistent with
17 both Dr. Jabbusch's report and the subsequent Greater Lakes evaluation, and as the
18 Commissioner notes, compromised by the report's own inherent flaws. AR at 664, 972, 1010.
19 Dr. Copeland found that the plaintiff suffered from marked depression and marked anxiety.
20 AR at 972. But the evaluation conducted by Greater Lakes months later indicated variation in
21 the plaintiff's condition, and therefore failed to reflect the medically documented "persistence,
22 continuous or intermittent," required by "paragraph A." AR at 1013-15. Dr. Copeland, relying
23 upon the plaintiff's self-report, concluded that she was unable to work because she spent four
24 or five days a week in bed. AR at 971. Yet the Greater Lakes evaluation reported that the

1 plaintiff suffered no marked difficulties in maintaining her activities of daily living. AR at
2 1010. Plaintiff's own comments during the Greater Lakes evaluation corroborate the ALJ's
3 finding that she was less than credible. AR at 1003, 1011. Specifically, plaintiff stated that
4 she was only present at the evaluation lest the state deny her continued assistance and noted
5 that she had no desire to take steps towards rejoining the workforce. AR at 1002, 1011.
6 Because the ALJ may reject medical opinions based upon self-reports of a claimant held to be
7 not credible, and because the ALJ discounted plaintiff's credibility (an issue not disputed in
8 this appeal), the Commissioner did not err in concluding that Dr. Copeland's evaluation, based
9 upon plaintiff's self-reports, was unlikely to have changed the ALJ's ruling. *See Bray v.*
10 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009).

11 C. The Commissioner Erred in Determining the Plaintiff's RFC

12 1. *Legal Standard*

13 The RFC is the "maximum degree to which [a plaintiff] retains the capacity for
14 sustained performance of the physical-mental requirements of jobs." 20 C.F.R. 404, Subpt. P,
15 App. 2 § 200(c). It is an administrative decision as to the most a plaintiff can do, despite her
16 limitations. SSR 96-8p. The ALJ must assess all of the relevant evidence, including evidence
17 regarding symptoms that are not severe, to determine if the claimant retains the ability to work
18 on a "regular and continuing basis," e.g., eight hours a day, five days a week. *Reddick v.*
19 *Chater*, 157 F.3d 715, 724 (9th Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995);
20 SSR 96-8p. The RFC assessment must be based on all of the relevant evidence in the case
21 record, such as: medical history; the effects of treatment, including limitations or restrictions
22 imposed by the mechanics of treatment (e.g., side effects of medication); reports of daily
23 activities; lay activities; recorded observations; medical source statements; effects of
24 symptoms, including pain, that are reasonably attributed to a medically determinable

1 impairment; evidence from work attempts; need for structured living environment; and work
2 evaluations. SSR 96-8p.

3 2. *The New Evidence Necessitates a Reevaluation of Plaintiff's RFC*

4 Plaintiff argues that her entire medical record, including the medical evidence from
5 DSHS submitted to the Appeals Council following her administrative hearing, shows
6 additional limitations that must be added to her RFC. Dkt. 13 at 7. Specifically, the ALJ did
7 not include postural limitations in his RFC assessment of the plaintiff, apart from the limitation
8 that the plaintiff cannot climb ladders, ropes, scaffolds, and must avoid exposure to hazards
9 such as open heights and open machinery when performing light work. *Id.* (citing AR at 26-
10 27). At a minimum, the plaintiff asserts, this case should be remanded in order to determine a
11 proper RFC that encompasses all her symptoms and limitations. Dkt. 13 at 8.

12 The ALJ's decision notwithstanding, because the plaintiff has submitted additional
13 objective medical evidence pertaining to her degenerative disc disease that is now part of the
14 administrative record, this action should be remanded to the Commissioner to reevaluate
15 plaintiff's RFC. Medical records from Community Health Care indicate that the plaintiff
16 suffers from lumbar degenerative disc disease. AR at 667-68. This is supported by a magnetic
17 resonance image ("MRI") of the plaintiff showing the lumbar spine's diffuse degenerative
18 changes and diffuse mild foraminal narrowing. AR at 669. In May 2009, another medical
19 evaluation concluded that the plaintiff is severely limited in her ability to work, and has
20 functional limitations in her ability to balance, climb, handle, push, and pull. AR at 712. In
21 addition, a DSHS evaluation from 2010 concluded that the plaintiff should be limited to
22 sedentary work. AR at 719.

23 The ALJ determined that he could not base the RFC assessment upon the plaintiff's
24 self-reports of pain alone, due to his assessment of her credibility. AR at 27, 30. Although the

1 ALJ did not err in this regard, this Court, in light of the entire record, is unable to determine
2 whether the ALJ's disability determination is still supported by substantial evidence. In such a
3 situation, the Court has "discretion to remand a case either for additional evidence and findings
4 or to award benefits." *Brewes*, 682 F.3d at 1164 (quoting *Smolen*, 80 F.3d at 1292). It is
5 appropriate for a court to award benefits when further administrative proceedings would be
6 fruitless, or when the record has been fully developed and the ALJ's decision is not supported
7 by substantial evidence. *See id.* Remand for further administrative proceedings, however, is
8 appropriate when outstanding issues remain unresolved. *Bunnell v. Barnhart*, 336 F.3d 1112,
9 1115-16 (9th Cir. 2003).

10 Due to the ambiguity in the record in this case, further proceedings are warranted.
11 Specifically, if credited as true, the additional DSHS evidence establishes that the ALJ's RFC
12 does not fully account for all of plaintiff's limitations. Accordingly, the Court recommends
13 that this case be REMANDED so that the ALJ can reconsider his decision in light of the
14 additional medical evidence. On remand, the ALJ shall consider the entire administrative
15 record in performing the five step sequential disability analysis, including a reevaluation of
16 plaintiff's RFC.

17 D. The ALJ Erred by Relying Upon Plaintiff's Cocaine Abuse to Find Her Not
18 Disabled Without Conducting a Drug and Alcohol Analysis

19 Although the parties have failed to address the ALJ's treatment of the plaintiff's history
20 of cocaine abuse, the Court notes that the ALJ appeared to consider plaintiff's substance abuse
21 material to the disability determination in this case. On March 29, 1996, Congress enacted the
22 "Contract with America Advancement Act of 1996," which amended various portions of the
23 Social Security Act. Pub.L. No. 104-121, 110 Stat. 847 (1996). Section 105(a)(1)(C) of the
24 amendments, titled "Denial of Disability Benefits to Drug Addicts and Alcoholics," provides

1 “[a]n individual shall not be considered to be disabled for purposes of this title if alcoholism or
2 drug addiction would (but for this subparagraph) be a contributing factor material to the
3 Commissioner’s determination that the individual is disabled.” 110 Stat. at 852 (1996)
4 (amending 42 U.S.C. § 423(d)(2)).

5 In determining whether a claimant’s drug addiction is material under 42 U.S.C.
6 § 423(d)(2)(C), the test is “whether an individual would still be found disabled if she stopped
7 using [] drugs.” 20 C.F.R. § 404.1535(b)(1); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9th Cir.
8 1998). Materiality, however, only becomes an issue after the individual proves that she cannot
9 perform any substantial gainful activity considering all impairments, including drugs and
10 alcohol. Thus, the ALJ first determines whether plaintiff’s impairments, including the use of
11 illicit drugs, are disabling, and then determines whether plaintiff’s impairments, absent the
12 effects of drugs, are disabling. The plaintiff has the burden of proving that her drug abuse is
13 not material to the finding of disability. *Ball v. Massanari*, 254 F.3d 817, 821 (9th Cir. 2001).

14 Before applying this statute, however, an ALJ must first conduct the five-step
15 sequential-evaluation process and conclude that the claimant is disabled. *Bustamante v.*
16 *Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). If a claimant is found to be disabled and there
17 is medical evidence of plaintiff’s drug or alcohol use, then the ALJ must apply the sequential-
18 evaluation process a second time to determine whether plaintiff would still be disabled if he or
19 she stopped using. *Id.* It is error for an ALJ to conclude that drug use precludes an award of
20 benefits prior to first applying the five-step process. *Id.*

21 The ALJ found that the plaintiff was not disabled. AR at 32. However, it is evident
22 from the decision that the ALJ focused on plaintiff’s cocaine use, in part, as a basis for
23 concluding plaintiff was not entitled to benefits. AR at 26. Accordingly, on remand, the five-
24 step sequential evaluation shall be conducted without reference to cocaine use, unless a finding

1 of disability is made, and then a Drug and Alcohol Analysis shall be administered, if
2 appropriate.

3 VIII. CONCLUSION

4 For the foregoing reasons, the Court recommends that this case be REVERSED and
5 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
6 instructions. A proposed order accompanies this Report and Recommendation.

7 DATED this 22nd day of August, 2012.

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9 JAMES P. DONOHUE
10 United States Magistrate Judge
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